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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Georgia

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To the Supreme Court of Georgia

Petitioner, Michelin Tire Corporation, a New York corporation (herein "Michelin"), respectfully prays that a Writ of Certiorari issue to review that portion of the judgment and decision of the Supreme Court of Georgia, entered in this case on February 4, 1975, which holds imported tires to be taxable. Such decision and judgment became final for the purpose of review by this Court on February 18, 1975, when the Supreme Court of Georgia denied Michelin's timely motion for rehearing. The respondents herein are W. L. Wages, Robert L. Wilson, Jack Bramblett, Harold Prince and John Ratcliff, all tax officials of Gwinnett County, Georgia.

OPINIONS BELOW

The opinion of the Superior Court for the County of Gwinnett, State of Georgia, is not and will not be reported. Such opinion is attached as Appendix A hereto. The opinion of the Supreme Court of Georgia, and that Court's Order denying Michelin's motion for rehearing, are not as yet reported. They are attached as Appendix B and C hereto.

JURISDICTION

The opinion of the Supreme Court of Georgia was rendered on February 4, 1975, and became final, for purposes of review by this Court, when the Supreme Court of Georgia denied Michelin's motion for rehearing on February 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether tires imported by Michelin in bulk and without packaging, and held for sale by Michelin in its Gwinnett County warehouse, in the original form in which such tires were imported, are immune under the Import Clause of the Federal Constitution from Gwinnett County ad valorem property taxes.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Import Clause (Article I, Section 10, Clause 2) of the Constitution of the United States, which provides that: "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; . . .".

STATEMENT OF THE CASE

Michelin, a New York corporation, is engaged in the business of importing into the United States automobile and truck tires and tubes manufactured outside of the United States and distributing such tires and tubes through franchised tire dealers.

As a part of such business, Michelin operates a distribution warehouse located in Gwinnett County, Georgia.

Tires and tubes imported by Michelin flow into such Gwinnett County warehouse from the factories outside the United States at which such tires and tubes are manufactured, and flow out from such Gwinnett County warehouse to franchised tire dealers scattered throughout six southeastern states. No sales of such tires and tubes are made by Michelin except to franchised tire dealers.

On all of such imported tires and tubes, Michelin has paid to the United States a 4% import duty.

The imported tubes with respect to which Michelin claims immunity from local taxation are imported in shipping cartons, and are held by Michelin in its warehouse in the original packages in which imported.

All of the imported tires are imported by Michelin in bulk, and without packaging. All of such imported tires are held by Michelin in its warehouse in the original form in which imported, and none of such tires are altered or modified in any way from the original form in which they were imported.

Michelin filed in the Superior Court of Gwinnett County, Georgia, this action seeking to enjoin the tax officials of that County from assessing and collecting Gwinnett County ad valorem property taxes on inventories of imported tires and tubes in Michelin's Gwinnett County warehouse.

In its original complaint, Michelin contended that such taxation is prohibited by the Import Clause of the Federal Constitution.

The case was tried in the Superior Court, and the Superior Court rendered its decision, Appendix A hereto, in favor of Michelin.

The tax officials appealed to the Supreme Court of Georgia, which (Appendix B hereto) upheld the immunity from tax with respect to the imported tubes held in Michelin's warehouse in the original packages in which imported, but denied immunity from tax with respect to the unpackaged imported tires, notwithstanding the fact that such tires were held by Michelin in its warehouse in the original form in which they were imported.

The Court based its decision with respect to the unpackaged imported tires on the ground that such tires lost their status as imports when they were segregated by size and style and commingled with other imported tires in Michelin's warehouse. Appendix B hereto, pp. A17-A18.

The Court recognized that the imported tires were held by Michelin in its warehouse in the original form in which they were imported. In its opinion it stated (Appendix B hereto, p. A7 that: "The individual tires are not treated or altered in any manner."

STAGE OF PROCEEDINGS AT WHICH THE CONSTITUTIONAL ISSUE WAS RAISED

As shown above, the constitutional issue was raised by Michelin in its original complaint herein, was decided by the trial court in favor of Michelin, and was decided by the Supreme Court of Georgia in favor of Michelin with respect to the imported tubes and adversely to Michelin with respect to the imported tires.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of Georgia Has Decided a Federal Constitutional Question of Substance in a Way Not in Accord With Applicable Decisions of This Court

It has long been established by decisions of this Court that imported goods are immune from local taxation while held for sale by the importer in the "original package" or in the "original form" in which imported.

In *Brown v. Maryland*, 25 U.S. 419 (1827), the Court (at 442) held with respect to imported goods which are held for sale by an importer, that "while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (Emphasis supplied).

In *Hooven and Allison Company v. Evatt*, 324 U.S. 652 (1945), the Court affirmed (at 666) that: "Indeed, goods imported, while they remain in the hands of the importer, *in the form and shape in which they were brought into the country*, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (Emphasis supplied).

In *Youngstown Sheet and Tool Company v. Bowers*, 358 U.S. 534 (1959), the Court (at 540) quoted with approval from *Brown v. Maryland* the statement that one who had imported goods for the purpose of selling them, had, "by payment of the duty to the United States, (acquired the) right to dispose of his merchandise, as well as to bring it into the country," and that the State could not tax it "while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported." (Emphasis supplied).

In *Florida Greenheart Corporation v. Gautier*, Fla. (1965), 172 So.2d 589, cert den 382 U.S. 825, the Supreme Court of Florida held that lumber imported in bulk and without packaging was immune from local taxation where held for sale by the importer in the "original form" in which imported. The Florida Court, after referring to the term "original package," said: "Where this expression has been used in the cases, *it has been used in juxtaposition with the words 'original form.'* This was the language used more than 100 years ago in the early case of *Brown v. State of Maryland* by Justice Marshall, 12 Wheat. 419, 25 U.S. 419, 6 L. Ed. 678. The cases since have held that the exemption attaches to the sale *in the original form or in the original package.*" (Emphasis supplied).

In *Citroen Cars Corporation v. City of New York*, 30 N.Y.2d 300 (1972), 283 N.E.2d 758, the Court of Appeals of New York held that automobiles, imported without packaging, are immune under the Import Clause of the Federal Constitution from local taxation so long as owned and held for sale by the importer, where no substantial physical change has been made in such automobiles from the form in which they were imported. In the Court's opinion, after discussing *Brown v. Maryland*. Judge Breitel (at 30 N.Y.2d 305) said: "At least, two points were made clear by the *Brown* decision. First, one who imports for sale has by payment of the customs duty acquired the right to sell the goods free from State taxation. Certainly this is true so long as the article remains in the importer's warehouse in the *form or package* in which it was imported." (Emphasis supplied).

The trial court below, in its decision herein, Appendix A hereto, correctly held (at A4) that the unpackaged imported tires are immune from local taxation while held for sale by Michelin, in its warehouse, in the "original form" in which imported.

The Supreme Court of Georgia, in its decision herein, Appendix B hereto, correctly recognizes and applies, with respect

to the packaged tubes which are held by Michelin in the original packages in which imported, the "original package" doctrine as established by the *Brown v. Maryland* line of decisions.

However, with respect to the unpackaged imported tires, which were held for sale by Michelin, in its warehouse, in the "original form" in which they were imported, the Supreme Court of Georgia ignores, disregards, and refuses to recognize and follow, the "original form" doctrine which is established by the *Brown v. Maryland* line of decisions.

In *Youngstown Sheet and Tube Company v. Bowers*, supra, this Court held, 358 U.S. 546, that goods imported for use in manufacturing had ceased to be imports and had become subject to local taxation where the "importation journey definitely had ended" and the goods were irrevocably committed to use in manufacturing at the "point of final destination."

By contrast, the imported tires here in question flow out of Michelin's Gwinnett County warehouse to franchised tire dealers scattered throughout six southeastern states, and therefore cannot reasonably be considered, while in such warehouse, as having reached the point where their "importation journey definately had ended" or as having come to rest at a "point of final destination."

In language which the Court quoted with approval in *Youngstown*, supra, at 540, footnote 6, the imported tires, while in the Gwinnett County warehouse, are "merely in transitu, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

Such imported tires, while in the Gwinnett County warehouse, are still in the flow of import distribution, have not come to rest at a final destination in Gwinnett County, and have not

become, in the language of *Brown v. Maryland*, 25 U. S. 441, "incorporated and mixed up with the mass of property" in Gwinnett County.

The Supreme Court of Georgia is mistaken in suggesting that Michelin's activity with regard to the imported tires is comparable to that of Justice Marshall's "itinerant peddler". Appendix B hereto, p. A17. An itinerant peddler is selling goods at retail, whereas Michelin sells the imported tires only at wholesale. An itinerant peddler is selling goods for local consumption at the point of final destination, whereas the imported tires flow out from Michelin's Gwinnett County warehouse to franchised tire dealers scattered throughout six states, and it is such franchised tire dealers who sell the tires for local consumption at the point of final destination.

In *Standard-Triumph Motor Company, Inc. v. City of Houston*, 220 F. Supp. 732 (S.D. Tex. 1963), judgment vacated on jurisdictional grounds, 347 F.2d 194, cert den 382 U.S. 974, the District Court correctly held that unpackaged imported automobiles were "still in transit", and were still imports, where "the importation of these vehicles was for the purpose of distributing them to dealers throughout a five state area where they would then be sold and operated." 220 F. Supp. 734.

The Supreme Court of Georgia has thus decided a federal constitutional question of substance in a way that is clearly not in accord with applicable decisions of this Court.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the State Court Decisions With Respect to the Immunity From Local Taxation of Unpackaged Imports.

The Courts of New York, North Carolina and Florida have recognized and given effect to the "original form" doctrine as

established by the *Brown v. Maryland* line of decisions, and have held accordingly that automobiles, tractor parts and lumber imported in bulk and without packaging are immune from local taxation where held for sale by the importer in the "original form" in which they were imported. *Citroen Cars Corporation v. City of New York* (1972), supra; *Wilson v. County of Wake*, N.C. App. (1973), 199 S.E.2d 665; *Florida Greenheart Corporation v. Gautier* (1965), supra.

The Courts of California, Louisiana, and now Georgia, ignore and disregard the "original form" doctrine which has been established by this Court in the *Brown v. Maryland* line of decisions, and hold that unpackaged imports lose their immunity from local taxation, although held for sale by the importer in the "original form" in which imported, if any single unpackaged article contained in a shipment is sold or is commingled with other imported goods. *E. J. Stanton & Sons v. Los Angeles County*, Cal. App. (1947), 177 P.2d 804, cert den 322 U.S. 766; *American Mannex Corp. v. Cronvich*, La. (1968), 207 So.2d 778; and the Georgia Supreme Court decision herein, Appendix B hereto.

The California and Louisiana decisions just cited are premised upon the theory that where goods are imported without packaging, the entire shipment constitutes an "invisible gossamer" package, 177 P.2d 808, which is broken when any single unpackaged article is removed from the shipment or is commingled with other imported goods.

Such "invisible package" theory is criticized and rejected by the courts of Florida and North Carolina in the *Florida Greenheart* and *Wilson* decisions cited above, and cannot be reconciled with the "original form" doctrine established by this Court in the *Brown v. Maryland* line of decisions.

Review by this Court is warranted to resolve the conflict in state court decisions.

C. Review by This Court Is Warranted to Resolve a Federal Constitutional Issue of Wide Import, the Resolution of Which Will Have Immediate Importance Far Beyond the Particular Facts and Parties Involved in This Case.

The issue involving immunity from local taxation of unpackaged imports is an important issue which affects a tremendous number of importers and local tax officials all over the country because (a) it is a matter of everyday occurrence for goods to be imported without packaging, and (b) the conflicting state court decisions rendered in recent years place local tax officials under pressure to try to disregard and ignore the "original form" doctrine, as the courts of three states have done.

The obvious result will be continuous litigation involving this issue unless and until this Court acts with finality to resolve such issue.

CONCLUSION

For the foregoing reasons, Michelin respectfully prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted

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APPENDICES

APPENDIX A

In the Superior Court for the County of Gwinnett
State of Georgia

Michelin Tire Corporation,
Plaintiff,
vs.
Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia; Jack Bramblett, Harold Prince and John Ratcliff, as Members of the Board of Tax Assessors of Gwinnett County, Georgia; and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia,
Defendants.

Civil Action
File No. 15,509

Order

Michelin Tire Corporation as plaintiff brought suit in this Court against Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia, members of the Board of Tax Assessors of said County, and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia, seeking to enjoin the collection of certain ad valorem taxes which had been levied by said authorities against certain automobile tires and tubes as a part of the inventory of plaintiff.

Plaintiff contends that said automobile tires and tubes are exempt from any ad valorem tax by virtue of Article I, Section 10, Clause 2 of the Constitution of the United States, the Import Clause, which provides in part:

"No State shall, without the consent of Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws."

Said matter came on to be heard before this Court without a jury, and after hearing evidence thereon and argument of counsel, judgment was reserved until the transcript might be completed and filed and briefs from counsel considered by the Court.

Both sides filed exhaustive briefs which have been carefully studied by the Court and which have been of great assistance to the Court.

From the evidence produced on the hearing, the Court finds as a matter of fact:

That plaintiff, Michelin Tire Corporation, is a domestic corporation organized and existing under the laws of the State of New York, authorized to and transacting business in Gwinnett County, Georgia.

Michelin Tire Corporation is engaged in the business of importing from abroad automobile and truck tires and tubes manufactured outside the United States by a foreign corporation, Michelin Tires, Ltd., for the purpose of selling and distributing said tires and tubes through franchised tire dealers.

Michelin Tire Corporation operates a distribution warehouse located in Gwinnett County, Georgia; all tires and tubes which come into said warehouse are imported by Michelin from factories outside the United States and import duty is paid on said tires and tubes upon their entry into this Country (with one exception when tubes were purchased in this Country when imports were scarce).

Such tubes as are imported are packed in cases which in turn contain individual cartons of tubes; the automobile and truck tires are imported in bulk and are not packaged in any way and are received at plaintiff's warehouse in Gwinnett County

from public conveyances, from which they are removed, separated by size and placed in plaintiff's warehouse.

Said tires and tubes are sold by plaintiff only to its authorized dealers.

The Supreme Court in the case of *Brown v. Maryland*, held:

"It is generally sufficient for the present to say that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.*" (*Brown v. Maryland* (1827), 25 U.S. (12 Wheat) 419, 6 L.Ed. 678).

The immunity of imported goods from local taxation includes immunity from local ad valorem property taxes; *Hooven and Allison Company v. Evatt*, 324 U.S. 652; *Low v. Austin*, 80 U.S. 29.

In Corpus Juris Secundum, at 15 CJS, beginning at page 763, Section 105, is found the following language:

"A State cannot impose a tax on goods transferred into the State until they lose their character as imports and have become intermingled with the common mass of property in the State." (Page 763)

"As long as goods from a foreign country remains the property of the importer, in the original *form* or package in which imported they retain their character as imports." (Page 764)

"The mere offering of the goods for sale does not subject them to taxation by the State." (Page 765)

> "The property need not necessarily be imported in packages to be immune from State taxation if it retains its original form." (Page 765)

The automobile and truck tires here involved while perhaps not in an original package are without doubt in the original form in which they were imported into this Country. Most tubes are in the original containers. Those tubes taken from the original containers have been included in inventory and tax paid on them.

While it would seem that where said tires and tubes have been placed in plaintiff's general inventory for the purpose of sale to its customers, that such inventory should be taxed to the same extent as any other inventory of any other business in Gwinnett County, and the Court would so hold if supported by the law, it is clear that where the property is imported for resale it retains its import exemption from ad valorem taxes until after such sale.

See the statement found in *Florida Greenheart Corporation v. Gautier, Tax Assessor,* et al., 172 So. 2d 589, where it was stated that:

> "In most instances, the very purpose of importing is for resale. It is after the sale, where it is sold in the original form or package, that it becomes taxable by local authority."

This Court must, therefore, bow to the authorities and hold that the automobile and truck tires in plaintiff's inventory are imports and until they have been sold are not subject to any ad valorem tax that may be levied against them by Gwinnett County.

Insofar as the tubes in plaintiff's inventory are concerned, those which remain intact in their original shipping cartons are likewise exempt from ad valorem tax and those which may be

removed from the original shipping cartons and placed in plaintiff's general inventory would be subject to an ad valorem tax levied by Gwinnett County authorities. (It appears that plaintiff has paid the tax due on such tubes as have been removed from the original containers.

It Is, Therefore, Considered Ordered and Adjudged that as prayed by plaintiff, the defendants are temporarily and permanently restrained from attempting to assess and collect additional taxes claimed to be due from plaintiff for the years 1972 and 1973; from issuing or causing to be issued against plaintiff any fi fa for the amount of such additional taxes; and from causing to be levied upon plaintiff's property any fi fa which might be issued;

That the assessments and valuations placed upon plaintiff's exempt merchandise inventory in the NOD Returns attached to plaintiff's complaint as Exhibits H and I, respectively, are null and void and of no force and effect; and

That the NOD Tax Bills attached to plaintiff's complaint as Exhibits J and K, respectively, are null and void and of no force and effect; and

Plaintiff is relieved from the payment of the additional taxes sought to be collected by the defendant Commissioners.

And It Is So Ordered, this 14th day of June, 1974.

/s/ CHAS. C. PITTARD
Judge
Gwinnett Superior Court

APPENDIX B

In the Supreme Court of Georgia Decided: Feb. 4, 1975

Wages, Comr., et al. v. Michelin Tire Corp.

29171. (516 to 6)

Gunter, Justice.

This appeal involves a complicated federal constitutional question. Gwinnett County, Georgia assessed an ad valorem tax against Michelin's inventory held in its warehouse on January 1, 1972, and January 1, 1973. Michelin contended that the imposition of the tax by the county violated Article I, Section 10, Clause 2 of the Federal Constitution, which states in part: "No state shall, without the consent of the Congress, lay any imposts or duties on any imports or exports, except what may be absolutely necessary for executing its inspection laws. . . ." Ga. Code Ann. Sec. 1-135. The trial court agreed with Michelin, declared the assessments void, and permanently enjoined the county's tax commissioner form collecting the tax. The appellants have come here seeking reversal.

Michelin Tire Corporation is a New York corporation qualified to do business in Georgia. It is an importer and wholesaler of automobile and truck tires and tubes. It operates a distribution warehouse in Gwinnett County, Georgia, and the inventory at the warehouse consists primarily of tires and tubes imported from foreign countries, although on both tax dates in question some domestic tubes were stored at the warehouse. Michelin pays a four percent import duty on all of its imports.

Imported tires and tubes are shipped to the warehouse by two methods of transportation. Some are delivered in over-the-road trailers, and the trailers are packed and sealed at the foreign factory and are delivered by common carrier directly to the warehouse. The remainder are transported in sea vans, which are basically over-the-road trailers with removable wheels. The vans are packed and sealed at the foreign factory; they are hauled to a port where the wheels are removed; they are transported by ship to a port of entry, where they are loaded off the ship and wheels are replaced; and they are transported to the warehouse. The vans usually arrive at the warehouse within a week of arrival at the port of entry. Michelin does not own any of the trailers or vans, and there is no intermediate distribution point on any of the shipments.

Imported tires are packed into the vans and trailers in bulk, without any packaging or bundling. Each tire is distinguishable by a serial number. Upon arrival at the warehouse, each trailer or van load is unloaded and sorted so that the individual shipments are no longer separate identifiable units. The tires are stacked on wooden pallets and stored in the warehouse, segregated by size and style, awaiting sale to retail dealers. The individual tires are not treated or altered in any manner.

Imported tubes are individually packaged in small boxes, and the boxes are transported in corrugated cartons measuring sixteen inches by twenty inches by twenty-four inches. The shipments of tubes are sorted upon arrival at the warehouse and cease to be separately identifiable units. The cartons of tubes are stored, segregated by size, in an area of the warehouse called the "full case" area. When it becomes necessary to open a carton, it is removed to an area called the "shelf area," where the individually boxed tubes are placed on shelves and held available for sale in small quantities. Michelin concedes that the tubes in the shelf area are taxable.

Domestic tubes are similarly packaged and similarly handled at the warehouse. Unopened cartons are stored in the full case area but apart from the foreign cartons. Open cartons are removed to the shelf area.

All the tires and tubes in the Gwinnett warehouse are sold to franchised Michelin dealers in six southeastern states. There are 250 to 300 such dealers who submit their orders, and Michelin makes delivery by common carrier or on a customer pickup basis. The orders vary in size and may be filled from any shipment from the manufacturer and from any pallet or carton, depending upon the size and styles ordered. No tires are sold directly to retail customers.

This case involves a question of first impression in Georgia, and we have examined in detail the pertinent cases of the Supreme Court of the United States as well as some of the leading cases from other states on the subject. A summary of these cases follows.

Brown v. Maryland, 25 US 419 (1827). This case, to this date, dominates every discussion of state taxation of imports. Maryland had a statute requiring all importers of goods by "bale or package" and all wholesalers of such imported goods to take out a license and pay a $50 fee. Brown was indicted for selling dry goods in the package in which they were imported without having a license. Chief Justice Marshall held that the license fee imposed on importers was equivalent to a tax on the imports. He then turned to the question of how to determine when imports lose their character as such and become taxable by the states. Maryland argued that goods ceased to be imports as soon as they enter this country, but Chief Justice Marshall rejected that argument and found the Maryland statute unconstitutional. He set the following tentative guidelines:

> The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must

> feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, when the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision, in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Until they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution . . .
>
> This indictment is against the importer, for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property, by the act of the importer.

This language has become the basis of the "original package doctrine" under which, in case after case, the power of the states to tax imports has been said to turn on whether the importer has physically altered the packaging of imported goods.

Lowe v. Austin, 81 US 29 (1871). California imposed an ad valorem tax on French champagne stored by the importer, pending sale, in a warehouse in the original cases in which it was imported. The court unanimously held the tax unconstitutional, saying: "The goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases."

May v. New Orleans, 178 US 496 (1900). May was an importer of dry goods sold in part on order and in part out of stock. The imported goods were always packaged by the foreign manufacturer in small parcels, and the parcels were packed for shipment in cartons, crates or bales. In making sales to customers, May never broke open the small parcels but sometimes broke the shipping packages in order to sell in smaller quantities. New Orleans imposed a property tax on those items held for resale and no longer in the shipping packages. The question in the case was whether the "original package" for constitutional purposes was the shipping package or the individual wrapper. The importer argued for the individual wrapper, and the City argued for the shipping package. A majority of the court (5-4) accepted the City's position and held the tax constitutional. The majority found the shipping packages to be the "original packages" within the meaning of *Brown v. Maryland, supra*.

Gulf Fisheries Company v. MacInerney, 276 US 124 (1925). This case involved the taxability of raw fish landed on U.S. shores in fishing boats. The court held that the fish lost their distinctive character as imports soon after coming ashore, when they were washed, iced, and packaged in bulk for sale to wholesalers.

Anglo-Chilean Corp. v. Alabama, 288 US 218 (1933). Alabama imposed an annual franchise tax based on the value of goods in stock. The tax was held unconstitutional as applied to an importer who was engaged in landing, storing, and selling nitrate in the manufacturer's one hundred pound bags. The original package was not an issue in the case but was assumed to be the individual one hundred pound bag.

Hooven and Allison v. Evatt, 324 US 652 (1945). Ohio assessed for state ad valorem taxes bales of hemp held by a manufacturer-importer in its factory warehouse preliminary to use in the manufacturing process. The record in the case did not show how much, if any, of the taxed inventory was necessary to meet "current operational needs" of the plant. The court expressly reserved decision as to whether inventory held for current operational needs could be taxed and held that, in general, goods imported for use in manufacturing are not taxable as long as they remain in the hands of the manufacturer-importer and in the original package. The court expressly adopted (5-4) the "original package doctrine" as the primary test in the "import for use" context.

Youngstown Sheet and Tube Co. v. Bowers and *United States Plywood Corporation v. City of Algoma*, 358 US 534 (1959). These two cases, decided together, expressly raised the issue reserved in *Hooven and Allison, supra*. Youngstown and U.S. Plywood were both importer-manufacturers. Youngstown imported iron ore and stored approximately a three month supply in ore yards adjacent to the furnaces. The daily ore needs were taken from the yards and conveyed to stock bins, from which the ores were fed into the furnaces. Ohio assessed an ad valorem tax on the ore in the ore yards. U.S. Plywood imported green lumber in bulk and wood veneers in bundles. Both the wood and the veneers were stored in yards adjacent to the plants. The wood was stacked to facilitate drying and from time to time taken to a kiln, where drying was completed. The veneers were kept

in piles, separated as to species, and remained in the original bundles until removed as needed for use in the plant. Algoma imposed an ad valorem tax on the wood and veneers. In both of these cases the court held the tax levies constitutional on the ground that the record showed that the entire inventories in question were irrevocably committed to the manufacturing process and therefore had been "used." The court found the original package doctrine inapplicable in this context. The court restated Chief Justice Marshall's test as follows:

> He held that the goods lose their character as imports when the importer (1) 'sells them', or (2) 'breaks up his packages, and travels with them as an itinerant peddler' . . . More important to the question confronting us, he also held (3) that goods brought into this country by an importer 'for his own use' and here 'used' by him are to be regarded as part of the 'common mass' of property and are not immuned from state taxation.

Although *Hooven and Allison* was distinguished on its facts, in practical effect, we conclude that it was overruled.

Department of Revenue v. James Beam Distilling Co., 377 US 341 (1964). Kentucky imposed an ad valorem tax on scotch whiskey while it was held by the importer in its warehouse in the original packages in which the whiskey was shipped. The issue in the case was whether the Twenty-First Amendment changed the import-export clause as to liquor. The court held that it did not and found the tax unconstitutional. This decision, by implication, reaffirmed (a) the original package doctrine in the context of imports for sale, and (b) the rule that ad valorem taxes fall under the constitutional prohibition.

American Mannex Corp. v. Cronvich, 207 So2d 778 (La. 1968). American imported tubular steel oil well casings. Shipments were ordered from Canadian manufacturers and shipped under bill of lading to a warehouse in Louisiana.

Upon arrival, each shipment was unloaded, sorted and stored with previous shipments. On rare occasions, shipments purchased from within the United States were stored in the same warehouse. The question was whether the original package was each entire shipment or each casing. The court held:

> We have no hesitancy in concluding, under the facts of this case, that the original packages of casings imported by the plaintiff comprised all casings covered by the bills of lading and that, when those casings or joints are stored in the warehouse and assorted with other tubing of like dimension and quality, they were co-mingled and, in reality, formed part of the retail importer's inventory, thus becoming irrevocably committed to the purpose for which they were ultimately destined, i.e., sale and disposal by plaintiff, under the ruling in the *Youngstown* case. In any case, when a portion of the shipment was sold at retail to the plaintiff's customers, all joints covered in the bill of lading, which we regard factually, as well as ficticiously, as the original package, lost their previous status as imports and became subject to local taxation.

Volkswagen Pacific, Inc. v. City of Los Angeles, 496 P2d 1237 (Calif. 1972). Volkswagen imported autos and auto parts for resale to franchise dealers. The parts were separately packaged and were transported in sea vans. The cars were imported in groups but were not packaged. The court held:

> (a) As to the parts, that removal from the sea van is not necessarily the incident that gives rise to taxability by the states, because removal from the sea vans may be necessary to permit further shipment of items to sales outlets in interior states. But where, as here, the individual items were removed from the vans for the purpose of permitting Volkswagen to make sales from the warehouse as wholesalers, then the items

have lost their immunity even though they remained in the manufacturer's packaging.

(b) As to the cars, they were taxable. Where packaging is inherently impossible or impracticable, an imported, unpackaged item loses its immunity from state or local taxation when it is removed from an aggregate of other similar unpackaged items imported as a unit with it.

E. J. Stanton and Sons v. Los Angeles County, 177 P2d 804 (Calif. App. 1947), cert. denied 322 US 766 (1947). Stanton was a wholesale and retail lumber dealer who imported raw lumber in bulk. The lumber was transported in ships without packaging and was delivered directly to the dealer's lot. There, each shipment was stored separately but was sorted and graded to facilitate eventual sale. From time to time, a given shipment would be broken either by sale of a portion or by co-mingling a portion with remnants of other shipments. Los Angeles County imposed an annual ad valorem tax on that portion of each broken shipment held by the dealer on the tax date but did not tax those shipments which remained intact. The California Court of Appeals upheld the tax. The question was whether the original package was each board or each shipment. The court held:

(a) That, for material shipped in bulk, the shipment is the package, and

(b) That such shipments become incorporated into the taxable mass of property when any part of a shipment is sold or co-mingled with other shipments held for sale.

Tri-Con, Inc. v. King County, 374 P2d 174 (Wash. 1962), cert denied 372 US 227 (1963). This case involved an ad valorem tax on the inventories of two importers of goods for resale. One imported steel products and the other imported glass products. Both held their products in the warehouse in the

original bundle, reel, crate or package until the time of resale. The question was whether *Youngstown* and *U.S. Plywood* had modified the original package doctrine with respect to goods imported for resale. The county argued that, under those cases, the imports became taxable when they became a part of the importers' current inventory of goods held for sale. The court rejected this argument and disallowed the tax.

Wilson v. County of Wake, 199 SE2d 665 (N.C. App. 1973). The county imposed an ad valorem tax on the inventory of an importer-wholesaler of undercarriage parts for crawler-type vehicles. Some parts were imported in wooden crates, some in bundles, and large ones as individual items. Upon arrival at the warehouse, the parts were sorted and stockpiled with previous shipments preliminary to sale. When it became necessary to break any package, the remains of the package were removed to a separate area of the warehouse. That such remains were taxable was admitted. On these facts, the court held the tax unconstitutional as applied to those items which remained in the condition in which they were shipped. More specifically, the court held: (a) that an entire shipment was not the original package and that the original package was not broken when one portion of a shipment was sold; and (b) that sorting and stockpiling of the components of any shipment did not cause them to lose their character as imports.

Florida Greenheart Corp. v. Gautier, 172 S2d 589 (Fla. 1965), cert denied 382 US 825 (1965). A county imposed a tangible personal property tax on inventories of lumber and pilings imported for resale. Upon arrival at the importer's yard, each shipment was sorted and stacked according to existing orders or according to type of lumber. Shipments did not remain identifiable units but were co-mingled with other similar imports held for resale. The question was whether the shipments or the individual piece of lumber was the original package. The court noted that the *Brown* test spoke of goods in the original

"form" or "package". The court held that the lumber could not be taxed until after it was sold by the importer.

Michigan State Tax Commission v. Garment Corp. of America, 189 NW2d 72 (Mich. App. 1971), cert denied 404 US 992 (1971). This case merely held that garments packaged in cartons which were shipped by sea van remained in the "original package" as long as they were in the cartons even though the cartons had been removed from the van.

Citroen Cars Corp. v. City of New York, 332 NYS2d 882 (N.Y. 1972). This case involved a franchise tax based on sales volume. Citroen imported automobiles which were delivered to a New York warehouse. The cars were sold both at wholesale and retail. Those sold at wholesale received minor preparations such as installation of a new battery, but were not cleaned and did not receive normal dealer preparation. Those sold at retail were fully cleaned and prepared and, frequently, were modified by the addition of American-made options. The court found the strict "original package" test inapplicable, and it held that the franchise tax could be applied to retail sales but not to wholesale sales. The court's reasoning turned on the commercial realities of the importers' situation, and it said:

> As with the original package doctrine a line must be drawn, sometimes arbitrarily, beyond which tax immunity will not extend (See e.g., *May Company v. New Orleans* . . .). Most important, the distinction made in this case comports with the business actualities and is economically supportable in separating imports still in the flow of international commerce from those which have come to rest, and are being treated by their owners as property at rest to be modified as they wish. . . . If the immunity were lost by the merest physical change, the immunity, at least with respect to imported automobiles would be without vitality, especially when one considers the complications

> of ocean transportation and the need for compliance with domestic automobile safety statutes.

In the case at bar the appellants argue that an annual ad valorem tax is not a tax on imports within the meaning of the federal constitutional provision. We reject this argument on the basis of the above-cited authority.

The appellants also argue that the "original package" is the sea van so that the imports lose their character as such when removed from the van. We likewise reject this argument. Sea vans are a normal means of transportation available through common carriers. To make the act of unloading the imports from the carrier a "breaking of the original package" is to make it impossible for importers who use that means of transportation to maintain the character of the goods as imports after the goods are in this country.

Appellants' third argument is that imports lose their character as such when sorted and co-mingled with other shipments preliminary to sale. As we read *Brown v. Maryland, supra*, it establishes a "two-hat" approach to importers for resale. Such importers are free to deal with their goods as imports after the goods are in this country; and, if they do so, the goods remain immune from state taxation. When, however, the importer deals with his goods as a seller, he becomes Chief Justice Marshall's "itinerant peddler"; and the goods become subject to state taxation. The original package doctrine is not a mechanical, universally applicable test; it is, instead, a useful means in many cases of determining which hat the importer-seller is wearing, because frequently the act of breaking the original package is preliminary to converting the imports to salable units.

In the case at bar the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were co-mingled and stored by size and type to make the individual units im-

mediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and co-mingled with other shipments have lost their status as "imports" and are subject to taxation.

However, packaged imports, the tubes in the corrugated cartons in this case, are not subject to taxation under the "original package" doctrine. This doctrine has been almost universally applied, in a mechanical way, for about 150 years. The great weight of authority makes a vast distinction between goods shipped in packaging, such as crates or cartons, and goods shipped in bulk. Packaged imports retain their status as imports, and are not subject to taxation. Bulk imports that have been mingled with other bulk imports, sorted, and arranged for sale do not retain their status as imports, and they are subject to taxation.

What we do in this case is to merely "draw a line", and it is, admittedly, a difficult line to draw.

Judgment affirmed in part and reversed in part. All the Justices concur, except Hill, J., disqualified.

APPENDIX C

Clerk's Office, Supreme Court of Georgia

Atlanta 2/18/75

Dear Sir:

The motion for a rehearing was denied today: Case No. 29171, Wages, Comr., et al. v. Michelin Tire Corp.

Hill, J., disqualified.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk
